

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D. C. 20555

January 30, 1981

MEMORANDUM FOR: Chairman Ahearne  
Commissioner Gilinsky  
Commissioner Hendrie  
Commissioner Bradford

FROM: Martin G. Malsch, Deputy General Counsel

SUBJECT: SECY-81-19 -- EMERGENCY RESPONSE FACILITIES

We have a difficulty with the subject paper which we would like to call to the Commission's attention. In law school law students learn from studying the Administrative Procedure Act that all of an agency's binding rules are published in the Federal Register and codified in the Code of Federal Regulations (CFR). After an individual has dealt with an agency for a few years he or she learns that sources other than the Federal Register and CFR must be consulted. This was already a fairly complicated matter with regard to NRC requirements prior to TMI, what with the extensive "gloss" placed on NRC's regulations by various adjudicatory decisions, regulatory guides, branch technical positions, standard review plans, and policy statements. 1/ After TMI came a new breed of quasi-requirements in the form of the TMI "Action Plan"

1/ The legal effect of these various documents becomes evident as one practices before NRC for an extended period of time (say 12 years). Rules are binding unless an exemption is granted under rules like 10 CFR 50.12 or the rule is successfully challenged under 10 CFR 2.758. Adjudicatory decisions are binding as a practical matter because the Commission rarely departs from stare decisis but as a matter of legal theory they are only binding on tribunals that are subordinate to the tribunal that issued the decision. Regulatory guides are not legally binding but are merely entitled to prima facie weight. However, regulatory guides are usually binding as a practical matter because departure from a regulatory guide can result in considerable delay in review of license applications. Branch technical positions are like regulatory guides except that upper management approval is not obvious. Standard review plans are the same as regulatory guides except that, inasmuch as they address staff rather than applicants and licensees,

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and related lists of near term operating license and (to be issued in the near future) near term construction permit requirements. 2/

Now comes the subject paper with the Staff's proposal that a NUREG be published on the subject of emergency response facilities. While the January 26, 1981 correction notice clearly improves things, the NUREG still has the tone of a formal document which imposes binding legal requirements. Indeed, it is indicated at the outset in the "Abstract" that the report describes facilities and systems "to be used by nuclear power plant licensees" and that licensees "should follow" the report. We are fearful that Commission approval of this latest Staff proposal will be taken as Commission approval to launch a new series of NUREG quasi-requirements that will need to be added to the current burgeoning list of NRC rules, adjudicatory decisions, regulatory guides, branch technical positions, standard review plans, and policy statements. Use of NUREGs to issue quasi-requirements will be especially confusing because even the most careful reader will be hard pressed to distinguish such a NUREG from other NUREG documents that are merely informational.

We can't say that this latest NUREG is the proverbial straw that breaks the camel's back, 3/ but there will be some point in the future when the expanding categories of NRC requirements and quasi-requirements reach the point when even the most experienced

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1/ (Continued from preceding page)

their effect on applicants and licensees is indirect. Policy statements are, like regulatory guides, standard review plans, and branch technical positions, not legally binding. However, they carry somewhat more practical weight than these other documents because they usually entail Commission review and approval. Of course one has to be careful that the particular regulatory guide, branch technical position, standard review plan, or policy statement at issue has not been incorporated into a rule or adjudicatory decision, in which case it has the same binding effect as the rule or decision. This is somewhat complicated because NRC often refers to other documents in rules without actually intending to incorporate them by reference.

2/ Some of the more knowledgeable NRC practitioners might add SECY-memos and PPPG documents to the list of NRC quasi-requirements.

3/ The camel's back has been broken in the past by other agencies. In United States v. Smith, 293 U.S. 633 (1934) the Government took an appeal in a criminal case all the way to the U.S. Supreme Court before discovering that the regulation on which the prosecution was based did not in fact exist.

NRC practitioners (scientists, engineers, and lawyers) will be totally confused as to what is, in fact, legally required. We believe that this process should be stopped before that point is reached. We suggest that the NUREG be reviewed and that those features of the NUREG that implement current regulations be issued in regulatory guide form, and that those features that do not implement any Commission regulation be considered for rulemaking. If adoption of this suggestion is not feasible here, then the Commission could at least indicate that in the future NUREGs should not be used to issue new requirements or quasi-requirements.

cc: OPE  
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